

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AMBER HOTEL COMPANY,

Plaintiff and Respondent,

v.

SHAWN CHEN et al.,

Defendants and Appellants.

B200271

(Los Angeles County
Super. Ct. No. GC036303)

APPEAL from a judgment of the Superior Court of Los Angeles County, C.
Edward Simpson, Judge. Affirmed.

Law Offices of Julian A. Pollock, Julian A. Pollok; Greines, Martin, Stein &
Richland and Marc J. Poster for Plaintiff and Respondent.

Llewellyn † Spann and David L. Llewellyn, Jr. for Defendants and Appellants.

INTRODUCTION

Defendants Shawn Chen and the Hanks Group, Inc. appeal from a judgment in favor of plaintiff Amber Hotel Company. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Amber Hotel Company (Amber) was a real estate brokerage that specialized in purchases and sales of hotel properties. Carl McGrogan (McGrogan) and David Bowman (Bowman) were real estate sales agents working for Amber.

McGrogan contacted defendant Shawn Chen (Chen) about whether Chen was interested in selling the Alhambra Inn, located at 2451 West Main Street in Alhambra (the property). Chen was the president, chief executive officer and 50 percent shareholder of defendant Hanks Group, Inc. (Hanks), owner of the property. Chen did not disclose this to McGrogan but rather represented that Chen was the owner of the property. After several subsequent telephone conversations, Chen indicated to McGrogan that he was ready to sell the property.

On January 25, 2005, Chen signed the Listing Agreement and Authorization To Sell (the listing), stating that Chen as the seller did “hereby employ [Amber] to market the Subject Property.” The listing proposed by McGrogan provided for a 6 percent commission to Amber “if a buyer is procured for the [property] under the terms of this [listing]. . . .” Chen negotiated the commission down to 5 percent and set the purchase price at \$4.5 million. The listing provided that any purchase and sale agreement resulting from the listing would be handled through an escrow at a company agreed to by the buyer and Chen, with escrow fees to be paid equally by the buyer and Chen.

Chen also negotiated a change giving him the right to cancel the listing “at any time” with “only one days [*sic*] notice,” rather than the 30-day prior notice proposed by McGrogan. Further, Chen required the addition of a provision that Amber could contact only Chen pertaining to the property and could not have any contact with the property’s

management or staff. Paragraph 7 of the listing provided for recovery of attorney's fees by the prevailing party in any action taken by either party under the listing or the applicable escrow instructions.

In the ensuing months, McGroggan, on behalf of Amber, presented several offers to Chen, but for less than the \$4.5 million asking price. Then on June 20, 2005, McGroggan submitted a full price offer for purchase of the property on a standard form Purchase and Sale Agreement and Joint Escrow Instructions (the offer). The offer was subject to an inspection period and a financing period. Paragraph 35 of the standard form agreement pertained to when the agreement became effective.¹ The buyer who signed the offer was Bhakta Patel (Patel). He owned another hotel and subsequent to his dealings with Chen through Amber, he purchased a second hotel. Patel testified at trial that he could obtain financing and had visited the property. The offer disclosed in writing that Amber, through McGroggan, was representing seller Chen and that Amber, through Bowman, was representing buyer Patel.

Chen received the offer, but Chen and Hanks failed to acknowledge the offer or to accept or reject the offer. Chen never gave Amber written notice of his intent to withdraw the property from sale or cancel the listing. Chen and Hanks failed to pay Amber the 5 percent commission totaling \$225,000.

Amber filed suit alleging breach of contract and fraud. Amber sought compensatory damages in the sum of \$225,000, exemplary damages and attorney's fees.

Following a bench trial, the trial court issued its statement of decision. The trial court found that Chen knew and understood the terms of the listing based upon his advanced degrees from universities in Oregon (also indicating facility with the English language), experience as a business man, and as evidenced by the changes he negotiated

¹ The agreement provision read as follows: "35. Effectiveness of Agreement [¶] Submission of this Agreement for examination or signature by Buyer is not effective as an offer or agreement to sell the property, or otherwise, until execution by and delivery to both Buyer and Seller of the original of this Agreement."

in the listing terms and his representation that he was the “Seller,” i.e., the owner of the property. The court found that Amber, through McGrogan, acted in reliance upon Chen’s representations in the listing, in that Amber marketed the property and obtained several offers as the result of its efforts.

As to the Patel offer, the court found that it was a full price offer of \$4.5 million, subject to an inspection period and a financing period. Further, the inspection and financing period provisions could be inferred from the terms of sale in the listing, were not inconsistent with it and, in any event, agreement upon them by Patel and defendants was not essential for Amber to be entitled to a 5 percent commission.

The trial court found that Chen and Hanks “failed to acknowledge or accept that offer and did not reject that offer.” The court accepted as true Patel’s testimony that he was ready, willing and able to complete the purchase.² The court noted defendants’ assertion that paragraph 35 of the offer must be interpreted to mean that “the offer was not really an offer.” However, the trial court ruled that, under paragraph 35, since Patel had already signed the offer, then it would become a contract binding Patel to purchase the property, which defendants would be entitled to enforce, upon signing by Chen.

On the issue of the dual agency disclosed in the offer, the trial court found that “the evidence demonstrates that the fact of dual representation was not a factor in defendants’ decision not to proceed with the transaction.” The court accepted as true Chen’s testimony that he, and Hanks as his principal, “never intended to sell the property but only wanted to ascertain its value.” The court also accepted as true McGrogan’s testimony that such intention was never disclosed to him. The trial court concluded that Chen’s execution of the listing without disclosing such intention constituted a promise

² Patel testified that, at the time he authorized Amber to submit the offer to Chen, he had the money necessary for the down payment and believed he had the ability to obtain financing for the remainder of the purchase price based upon his prior business experience.

made without an intent to perform, that is, fraud. The court cited *Steve Schmidt & Co. v. Berry* (1986) 183 Cal.App.3d 1299 as supporting authority for its conclusions.

The judgment provided that Amber was to recover from Chen and Hanks, jointly and severally the following sums: The principal sum of \$225,000, prejudgment interest, costs and attorney's fees. By a subsequent order, the trial court fixed attorney's fees at \$39,005.

DISCUSSION

Defendants primarily contend that the trial court erred in rendering judgment for Amber for recovery of \$225,000, in that Amber had no right to a commission based upon the Patel offer. The reasons they give in support of their contention relate solely to whether the offer complied with the terms of the listing and a broker's fiduciary duty regarding dual representation of both the seller and the buyer.

Defendants challenge the trial court's liability determinations only indirectly. They claim the trial court committed reversible error, in that the trial court's findings and determinations of liability for both contract breach and fraud are necessarily contradictory. As we discuss below, we disagree with defendants' contentions and affirm the judgment.

A. Standard of Review

In addressing the issues on appeal, we begin with the presumption that the judgment of the trial court is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) As a general rule, the judgment will be affirmed if it is correct on any theory, even though the plaintiff sought recovery on several bases or the judgment was made on an incorrect ground or for an erroneous reason. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1046, disapproved on other grounds in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1182.)

Where, as here, defendants' contentions question the sufficiency of the evidence to support the judgment, our power "'begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support'" the trial court's findings. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) Evidence is "substantial" if it is of ponderable legal significance, reasonable, credible and of solid value. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) The testimony of a single witness can constitute substantial evidence sufficient to uphold a finding of the trial court. (*City and County of San Francisco v. Givens* (2000) 85 Cal.App.4th 51, 56.) In applying the substantial evidence standard, we resolve any conflicts in the evidence or reasonable inferences arising from the facts in support of the trial court's decision. (*In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 342.)

Weighing the evidence and determining its credibility are within the sole province of the trier of fact. (*Howard v. Owens Corning, supra*, 72 Cal.App.4th at p. 630; *In re Casey D.* (1999) 70 Cal.App.4th 38, 52.) We must defer to the trial court's credibility determination and may reject evidence the court found credible only if its truth is a physical impossibility or its falsity is apparent without resorting to inferences or deductions. (*Warren v. Merrill* (2006) 143 Cal.App.4th 96, 109; *Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492.)

B. Consistency of Contract and Fraud Findings

We first consider defendants' contention that the trial court made contradictory findings on material issues in determining liability for breach of contract as well as promissory fraud. Specifically, as to Amber's breach of contract allegations, defendants assert that the trial court found that Chen intended to sell when he signed the listing, but later refused to sell and thus breached the listing agreement. Defendants assert the contract finding directly contradicts the trial court's further finding that Chen signed the listing agreement without intent to perform and thus, defendants were liable for promissory fraud.

Defendants misstate the trial court’s finding with respect to the listing agreement. In the statement of decision, the trial court stated as follows: “. . . [Amber] justifiably relied on . . . Mr. Chen’s representations, both oral and written, of an intent to sell the [Property] and to pay a sales commission. [¶] . . . [¶] The court accepts as true the testimony of Mr. Chen that he (and Hanks) never intended to sell the [Property] but only wanted to ascertain its value. The court accepts as true the testimony of Mr. McGrogan that his hidden intention was never conveyed to him.” The implied finding of the court was that the listing was a valid and enforceable contract, in that an objective criterion of consent, such as Chen’s signing the listing and orally representing to Amber that he wanted to sell, determines the existence of mutual consent necessary to form an enforceable contract; a contrary undisclosed intent does not alter the validity of the contract. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.)

The trial court also found that defendants were liable for fraud, in that they made a promise without an intent to perform. “Promissory fraud . . . consists of making a promise *without the present intention to perform it*, i.e., misrepresenting the speaker’s *then-present intentions*. [Citation.]” (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 575;³ see also Civ. Code, §§ 1709, 1710, subd. 4.) “An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. [Citations.]” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

The contradictory findings standard defendants rely on does not apply to the instant case. The standard is expressed as follows in *Stiefel v. McKee* (1969) 1 Cal.App.3d 263 at page 266: “[W]here the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error.” [Citation.]” Defendants also cite *Coffee-Rich, Inc. v.*

³ In *Yield Dynamics v. TEA Systems Corp.*, *supra*, the court held that there was no liability for promissory fraud, in that the plaintiff failed to prove that the defendants lacked intention to perform their contractual obligations at the time they signed the contract. (154 Cal.App.4th at p. 575.)

Fielder (1972) 27 Cal.App.3d 792 at page 802. Neither of the cases involved a fraudulent inducement to enter into and perform a contract as in the instant case.

Under the facts in the instant case, the contract and fraud findings are not contradictory. Rather, they are consistent with Amber's claims arising from defendants' fraudulent inducement to enter into and perform the listing agreement. The well-settled rule is that "one who is induced by fraud to enter into a contract is entitled *both* to 'affirm' the contract *and* to sue for damages in tort. . . . [T]he victim of the fraud . . . has the right to 'retain the benefits of the contract . . . , and make up in damages the loss suffered by the fraud. . . .' [Citation.]" (*Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1220.) Thus, where a contract is enforceable, a plaintiff may have a cause of action in fraud as well as contract. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638.)

Amber preserved the contract issues by affirming the listing and also suing for fraud damages. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638.) Thus, there is no reversible error based on contradictory findings on material issues. (*Stiefel v. McKee, supra*, 1 Cal.App.3d at p. 266.)

On an added note, where, as here, a fraud victim affirms the contract and seeks fraud damages, the rule against double recovery of tort and contract compensatory damages may limit the victim's recovery. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638.) In the instant case, however, that is not an issue, in that the judgment provides for a single recovery and defendants do not contend otherwise.

C. Dual Agency

Chen and Hanks first contend that Amber forfeited all claims to a commission, in that Amber breached its fiduciary duty to them when it undertook representation of the buyer, Patel, without first disclosing the dual agency to them and obtaining their consent. We disagree.

The relevant facts are undisputed. Amber made a detailed written disclosure of the dual agency in the offer, well in advance of any sale of the property.

Civil Code section 2079.14 requires that a broker make written disclosure of dual representation of the buyer and the seller prior to finalizing a listing agreement. However, Civil Code section 2079.14 applies only to residential real estate sales. The listing agreement was for the sale of commercial property. No similar statutory requirements apply to sale of commercial real estate.

A common law duty of dual agency disclosure applies, however, with respect to commercial as well as residential real property. (*McConnell v. Cowan* (1955) 44 Cal.2d 805, 806-807, 813; *L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 304-305 and fn. 3.) The time such disclosure is required is prior to the time the principals, i.e., the buyer and the seller, finalize a contract for sale of the commercial property. If a broker fails to disclose his dual agency to one or both of the principals prior to such time, a principal without knowledge of the dual agency may avoid the transaction and the broker will not be entitled to any commission or other compensation from either principal. (*McConnell, supra*, at p. 809.) The loss of right to a commission applies regardless of the absence of the broker's fraudulent intent, bad faith or injury to the principal. (*Id.* at pp. 809-810.)

Most of the cases that defendants rely on in support of their contention are factually distinguishable from the instant case. They involve situations in which the transaction closed and the seller's broker failed to disclose material information which also related to the broker's secret profiteering. The factual scenarios included failure to disclose the broker's pre-existing familial or business relationship with the buyer, that the actual value of the property was higher than the price to be paid, that adverse conditions of the property existed and were likely to affect the buyer's willingness to complete the transaction at the specified price, and that another potential buyer had made a higher offer prior to the seller finalizing the sale contract with the previous potential buyer.⁴

⁴ Defendants cited *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 177-178 [broker failed to disclose to buyers a report of adverse property conditions and to disclose to sellers that broker was representing both sellers and buyers]; *Sierra Pacific Industries v. Carter* (1980) 104 Cal.App.3d 579, 581 [broker concealed material information from

Dual representation was an issue in only two of the cases cited by defendants—*McConnell v. Cowan*, *supra*, 44 Cal.2d 805 and *L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.*, *supra*, 1 Cal.App.4th 300. Those cases are also distinguishable from the instant case, in that the broker made no disclosure of the dual agency to one or both of the principals. In the instant case, disclosure was timely, in that Amber disclosed the dual agency well before Chen and Patel were to finalize any transaction. (*L. Byron Culver & Associates*, *supra*, at p. 305.) We conclude that the trial court properly determined that there was no showing of breach of fiduciary duty by Amber with respect to its dual representation of defendants and Patel.

D. Defendants’ Failure To Respond to Offer and the Included Disclosure

It is undisputed that defendants never responded to the dual agency disclosure or any other part of the offer. Defendants claim that they had no duty to respond. That is no defense, however, when the seller is defending against the broker’s claim for a commission after procuring a buyer as required by the listing agreement. If the seller does not make a specific objection to the terms of the offer, “but asserts only his unwillingness to sell as a reason for his refusal to proceed with the sale, he may not defend against the broker’s claim for a commission upon objections to details the broker

seller that buyers were broker’s close family members]; *Smith v. Zak* (1971) 20 Cal.App.3d 785, 793-794 [broker failed to disclose buyer was broker’s associate and intentionally misled the seller, inducing seller to sell at a selling price substantially lower than the property’s value]; *Loughlin v. Idora Realty Co.* (1968) 259 Cal.App.2d 619, 621-622 [as a result of his false representations to seller, broker made secret profits on sale to his close family member and immediate resale to other buyers at higher price]; *Jarvis v. O’Brien* (1957) 147 Cal.App.2d 758, 759 [broker failed to disclose to seller that broker was a partner with buyers and to disclose to his partners, the buyers, that he would earn a commission from the sale]; *Cisco v. Van Lew* (1943) 60 Cal.App.2d 575, 577 [having received a deposit, but no signed written purchase offer or contract from Mr. Cisco, broker signed escrow instructions showing broker “or his nominee” as purchaser, failed to disclose to seller a subsequent offer by another prospective buyer, and then instructed escrow company to insert Mr. Cisco’s name as his nominee and, thus, purchaser of the property].

might have supplied or corrected if they were brought to his attention.” (*Martin v. Culver Enterprises, Inc.* (1966) 239 Cal.App.2d 925, 929; accord, *Merzoian v. Papazian* (1921) 53 Cal.App. 112, 115; *California Land Security Co. v. Ritchie* (1919) 40 Cal.App. 246, 253.) Defendants apparently are contending that Amber could not have made any such correction; rather, as soon as Amber engaged in dual representation, Amber’s right to receive a commission automatically terminated. As previously noted, none of the cases cited by defendants provide authority for such a conclusion under the facts of the instant case.

Amber made the required dual agency disclosure and was prevented from taking any corrective action by defendants. Defendants never raised an objection on *any* grounds, but simply did not communicate further. Defendants are not now in a position to assert that Amber is not entitled to its commission on the basis of dual agency. (Civ. Code, § 1512; *Martin v. Culver Enterprises, Inc.*, *supra*, 239 Cal.App.2d at p. 929; cf. *Herz v. Clarks Market* (1960) 179 Cal.App.2d 471, 474.)

E. Entitlement to Commission Under Terms of the Listing

Defendants contend that Amber is not entitled to payment of any commission, in that the offer Amber produced contained terms, conditions and contingencies materially different from the listing, including certain cancellation rights of buyer. We disagree.

The general rule is that “if a broker produces a buyer on terms set out in his listing agreement, and the seller refuses to perform, the broker may recover his commission on his contract with the seller.” (*Seck v. Foulks* (1972) 25 Cal.App.3d 556, 569; accord, *Steve Schmidt & Co. v. Berry*, *supra*, 183 Cal.App.3d at p. 1310.) When a broker produces a buyer who is “ready, willing and able to purchase the property on the terms stated in the listing agreement,” the broker has earned its commission. (*Steve Schmidt & Co.*, *supra*, at p. 1306.)

The terms of the listing agreement need only contain essential elements of a contract of sale, including the selling price, the name of the owner, and payment conditions. (*Magna Development Co. v. Reed* (1964) 228 Cal.App.2d 230, 239; see also

Steve Schmidt & Co. v. Berry, supra, 183 Cal.App.3d at p. 1306.) The listing in the instant case includes only essential terms: price, owner, property description and that payment is to be made through an escrow. Contrary to defendants' claims, the listing does not specify, for example, that the offer must be an all-cash offer or the length of the escrow.

An offer, however, may contain terms in addition to the essential terms in the listing. (See *King v. Stanley* (1948) 32 Cal.2d 584, 589; *Bisno v. Herzberg* (1946) 75 Cal.App.2d 235, 241.) In the instant case, the offer is presented on a form purchase and sale agreement which contains several more provisions than the terms essential to a listing agreement. The inclusion of additional terms does not render the offer non-compliant with the listing. For instance, "[t]he ordinary terms set forth in a contract for the purchase of a hotel are a part of the contract even though not set forth in full; and where such terms must be supplied by construction the contract is sufficiently definite to support a decree for specific performance." (*Bisno, supra*, at p. 241.) "In the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, furnishing deeds, title insurance policies, prorating of taxes, and the like." (*King, supra*, at p. 589.)

Defendants mistakenly claim that the inspection and financing provisions give Patel the unilateral right to cancel the escrow "in buyer's sole discretion" and paragraph 35 gave Patel the unilateral right to withdraw the offer at any time. Therefore, defendants assert, Patel's offer is illusory and not effective as an offer to enter into an enforceable purchase contract. Defendants rely on the California Supreme Court's explanation in *Bleecher v. Conte* (1981) 29 Cal.3d 345 at page 350 that "[a] bilateral contract is one in which there are mutual promises given in consideration of each other. . . . [¶] If a party is not assuming a legal duty in making a promise, the agreement is not binding as a bilateral contract. . . . ' . . . Without this mutuality of obligation, the agreement lacks consideration and no enforceable contract has been created. [Citations.]'"

In the inspection and financing provisions, however, Patel's right to cancel is not unconditional. It is limited in duration and restricted to a reason relating to the inspection

and financing periods. Further, Patel's cancellation rights are subject to the reasonableness principle expressed in *Rodriguez v. Barnett* (1959) 52 Cal.2d 154: "Contracts making the duty of performance of one of the parties conditional upon his 'satisfaction' are upheld on the theory that the expression of dissatisfaction must be genuine and not arbitrary, and that an objective criterion,—good faith—controls the exercise of the right to determine satisfaction." (*Id.* at p. 160.)

Paragraph 35 provides simply that the mere submission of the form purchase agreement by the seller or its broker for examination or signature by the buyer does not constitute an offer by the seller or an agreement to sell the subject property, and the form purchase agreement does not become effective as a contract until it is signed by both the buyer and the seller. Paragraph 35 is a condition that is mutual, applying to both the buyer and the seller. Hence, Patel as the buyer does "not have an unfettered right to cancel [his] contract or ignore [his] contractual obligations" under the inspection or financing provisions or paragraph 35. (*Bleecher v. Conte, supra*, 29 Cal.3d at p. 351.) Under such circumstances, an agreement is enforceable. (*Id.* at p. 352.) Accordingly, we conclude that the trial court properly determined that Patel's offer was not illusory. (*Ibid.*)

As previously noted, in order to be entitled to its commission, a broker must not only substantially comply with the listing agreement, but also the buyer produced must be ready, willing and able to complete the purchase of the property. (*Steve Schmidt & Co. v. Berry, supra*, 183 Cal.App.3d at pp. 1306, 1310.) The trial court found that Patel was ready, willing and able to complete the purchase, could obtain financing and had visited the property, implying that the findings were based upon the court's acceptance of Patel's testimony as credible. If it is credible, the testimony of only one witness such as an officer or principal of the buyer is sufficient to establish the buyer's ability to perform. (See *Martin v. Culver Enterprises, Inc., supra*, 239 Cal.App.2d at p. 930.) Thus, the trial court's finding is supported by substantial evidence. (*Ibid.*) Accordingly, the trial court properly determined that Amber complied with its obligations to perform pursuant to the

listing and would be entitled to its commission. (*Steve Schmidt & Co., supra*, at pp. 1306, 1310; *Seck v. Foulks, supra*, 25 Cal.App.3d at p. 569.)

In sum, we conclude that the trial court's judgment for joint and several liability of Chen and Hanks is correct under a theory of promissory fraud. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638; *Yield Dynamics, Inc. v. TEA Systems Corp., supra*, 154 Cal.App.4th at p. 575.) A trial court judgment will be affirmed if it is correct on any theory, even though the plaintiff sought recovery on several bases. (*Diamond Woodworks, Inc. v. Argonaut Ins. Co., supra*, 109 Cal.App.4th at p. 1046.)

F. Award of \$225,000 in Damages, Prejudgment Interest and Attorney's Fees

Defendants' final contention is that the damages, prejudgment interest and attorney's fees awarded by the judgment are consistent only with Amber's cause of action for breach of contract and may not be awarded under the fraud cause of action. For the reasons discussed below, we determine that the awards were proper.

1. Damages

Defendants contend that the damages award was improper, in that it was consistent with the "benefit of the bargain" measure of damages for breach of a contract, but not with the "pecuniary loss" measure of damages for fraud under Civil Code section 3333 and the Restatement Second of Torts, section 549(1). Further, they claim, the trial court made no findings as to the value of the loss to Amber for services Amber performed for defendants.

Defendants misstate the measure of damages for fraud related to a contract. The California Supreme Court explained that "[b]ecause of the extra measure of blameworthiness inhering in fraud, and because in fraud cases we are not concerned about the need for 'predictability about the cost of contractual relationships' [citation], fraud plaintiffs may recover 'out-of-pocket' damages in addition to benefit-of-the-bargain damages.'" (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 992, quoting *Lazar v. Superior Court, supra*, 12 Cal.4th at p. 646; see also Rest.2d Torts,

§ 549(2).) Of these two measures of damages for fraud, “[t]he benefit-of-the-bargain measure places a defrauded plaintiff in the position he would have enjoyed had the false representation been true, awarding him the difference in value between what he actually received and what he was fraudulently led to believe he would receive.” (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 236.)

It is undisputed that Amber received nothing from defendants. What Amber was fraudulently led to believe it would receive was \$225,000 for its services under the listing agreement. The trial court found that Amber had performed the services required by the listing and, therefore, was entitled to the \$225,000 commission. Thus, an award of damages in the amount of \$225,000 was proper under the “benefit of the bargain” measure of damages for contractual fraud. (*Robinson Helicopter Co., Inc. v. Dana Corp.*, *supra*, 34 Cal.4th at p. 992; *Fragale v. Faulkner*, *supra*, 110 Cal.App.4th at p. 236.) The judgment did not state that Amber was to recover its commission. The judgment provided only that Amber was entitled to recover “[t]he principal sum of \$225,000.” Under the applicable facts, the judgment is consistent with a measure of fraud damages authorized by law. (*Robinson Helicopter Co., Inc.*, *supra*, at p. 992.)

2. Prejudgment Interest

Contrary to defendants’ contention, the trial court properly awarded prejudgment interest under the theory of promissory fraud. Such interest is authorized for contractual damages, from the day the right to recover damages vested in the plaintiff. (Civ. Code, § 3287.)⁵ It is also authorized for damages for fraud, however, with interest running from

⁵ Civil Code section 3287 provides in subdivision (a): “Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt.”

the date the loss was incurred. (Civ. Code, § 3288,⁶ *Michelson v. Hamada*, *supra*, 29 Cal.App.4th at p. 1588.) Thus, the trial court properly awarded prejudgment interest on the fraud damages of \$225,000.

3. Attorney's Fees

Paragraph 7 in the listing agreement provides for an award of attorney's fees to the prevailing party in any action taken by either party under the agreement. Under promissory fraud principles, Amber affirmed the fraudulently induced contract and sued for fraud damages. Where fraudulent misrepresentation applies to contractual obligations, damages may include "out of pocket" losses as well as "benefit of the bargain" damages. (*Robinson Helicopter Co., Inc. v. Dana Corp.*, *supra*, 34 Cal.4th at p. 992; *Fragale v. Faulkner*, *supra*, 110 Cal.App.4th at p. 236.) The award of attorney's fees to Amber was proper under either measure of fraud damages. (*Robinson Helicopter Co., Inc.*, *supra*, at p. 992.)

⁶ Civil Code section 3288 provides: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." In a non-jury trial, the court has discretion to award prejudgment interest. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1587.)

DISPOSITION

The judgment is affirmed. Plaintiff is awarded its costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.